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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

SHERIFF RICHARD MACK,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondents.

AMICUS BRIEF ON BEHALF OF DOCTORS FOR INTEGRITY IN POLICY RESEARCH, DOCTORS FOR RESPONSIBLE GUN OWNERSHIP, AND THE LAWYER'S SECOND AMENDMENT SOCIETY IN SUPPORT OF PETITIONER SHERIFF RICHARD MACK

STEVEN A. SILVER, ESQ.
THE LAWYER'S SECOND AMENDMENT SOCIETY
18034 Ventura Blvd., No. 329
Encino, CA 91316
(310) 479-0515 ext. 239

Counsel for Amici Doctors for Integrity in Policy Research, Inc., Doctors for Responsible Gun Ownership, and The Lawyer's Second Amendment Society

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INTEREST OF THE AMICI

All parties in this appeal have graciously consented to the filing of this brief which supports the position of Petitioner Sheriff Richard Mack. These consents have been filed with the Clerk of the Supreme Court.

1. Amicus DOCTORS FOR INTEGRITY IN PUBLIC RESEARCH

Doctors for Integrity in Policy Research, Inc. (DIPR), a non-profit corporation, is a national "think tank" of medical school professors, researchers, and practicing physicians who are committed to exposing biased and incompetent research, editorial censorship, and unsound public policy. DIPR con-

ducts review research, publishes and publicizes its findings, and, to promote sound public policy, testifies before Congressional and other legislative committees and participates in litigation.

Though DIPR has decried the politicization of AIDS research, pharmaceutical "ghost writing" of research for "name" authors, and fabrication of breast cancer research data, nowhere is substandard science more prevalent than in the medical literature on guns and violence. DIPR's research projects have been published in the peer-reviewed medical literature. It is also active in exposing the waste of tax payer money not only in funding of substandard and politicized research, but also in the illegal use of tax money for political lobbying and diversion of funds by the Centers for Disease Control's National Center for Injury Prevention and Control.

2. Amicus DOCTORS FOR RESPONSIBLE GUN OWNERSHIP

Doctors for Responsible Gun Ownership (DRGO) is a nationwide network of physicians and other health professionals who support the safe and lawful use of firearms. DRGO is a project of The Claremont Institute, a policy analysis "think tank" in Claremont, California. DRGO's members come from academia, the military, private practice, and medical school student bodies. DRGO's mission is to bring balance to the medical debate on firearms. It brings to public and medical forums the abundant scientific evidence which militates in favor of safe and prudent use of firearms by law-abiding citizens.

3. Amicus THE LAWYER'S SECOND AMENDMENT SOCIETY

THE LAWYER'S SECOND AMENDMENT SOCIETY (LSAS) is a non-profit California corporation head-

quartered in Encino, CA. LSAS fosters open, rigorous discussion of the constitutional right to arms. Its purposes include sponsoring legal, historical and philosophical research on the topic and stimulating greater public knowledge and understanding of the Second Amendment. The LSAS's specific activities include writing articles, and conducting research for publication in legal and other periodicals, providing speakers on the issue of the individual right to keep and bear arms, publishing its newsletter, "The Liberty Pole," and participating in litigation regarding the Second Amendment.

DISCUSSION

I

INTRODUCTION

Firearms in the hands of Americans are overwhelmingly a net benefit to society. The vast weight of the evidence shows firearms in the hands of law-abiding citizens actually reduce violence and crime.

Due to the enormous benefits of firearms in society in terms of the lives saved, injuries prevented, medical costs averted, and property protected by citizens with firearms, this Court is respectfully requested to consider that, not only is the Brady Law offensive to the Tenth Amendment, it also seriously hampers the citizens' inalienable right of self-defense.

Amici will demonstrate the blatant falsehood of repeated claims that the Brady Law has prevented "Sixty thousand" criminals from obtaining firearms. *Amici* provide this documentation for the sole purpose of showing, unequivocally, no compelling government interest justifies the Brady Law. Far from a public policy disaster, dismantling the Brady Law is a public benefit.

II

GUN CONTROL IS NOT CRIME CONTROL

To place the specifics of the Brady Law in perspective, the larger perspective of gun control must be examined. A forthcoming study of 15 years' data by University of Chicago researchers shows that "1,570 murders; 4,177 rapes; and over 60,000 aggravated assaults would have been avoided yearly" if states with restrictive laws would reform those laws to make it easier for mentally competent, law-abiding adults to carry concealed handguns for protection outside the home.[1]

The scholarly literature increasingly vindicates firearms as "pathogens" of violence, and it exposes gun control as a "placebo" or "suicide pill," rather than a "cure" for gun violence.[2] In fact, the strategy of repackaging gun control as a "public health" measure[3] resulted because of the near unanimous recognition, within the criminological scholarly literature, that gun control was a failure as crime or violence control.[4]

Stringent gun control does not, and cannot, keep firearms out of the hands of willful predators who ignore laws against drug trafficking, rape, and murder. Indeed, that is why they

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[1] Lott JR and Mustard DB. "Crime, Deterrence, and Right-to-Carry Concealed Handguns." Journal of Legal Studies. January 1997, forthcoming.

[2] Suter EA, Waters WC, 4th, Murray GB, Hopkins CB, Asiaf J, Moore JB, Fackler M, Cowan DN, Eckenhoff RG, Singer TR, et al. "Violence in America — Effective Solutions." Journal Med. Assoc. Ga. June 1995; 84(6):253-263.

[3] Sugarmann J and Rand K. Cease Fire - A comprehensive strategy to reduce violence. Washington DC: Violence Policy Center. 1993.

[4] This voluminous literature is best summarized in Kleck G. Point Blank: Guns and Violence in America. New York: Aldine de Gruyter. 1991.

are called "criminals." By whatever increment any firearm control measure inconveniences criminals, those criminals are not (the wishful and repeated claims of gun control advocates to the contrary notwithstanding) "prevented from obtaining guns." They are merely displaced into the fast and uncontrolled illegal gun market.

Predators who sell crack by the gram or heroin by the kilogram, can quickly find a black-market gun, and they can certainly afford the high prices for such firearms, without the inconvenience of a background check or waiting period. Gun control merely impedes gun purchases by law-abiding citizens, who ultimately become the predators' victims. Victim disarmament does not saves lives, it costs lives. Quite simply, gun control is a counter-productive, even deadly, failure.

In short, to the extent the Brady Law impedes the access of law-abiding citizens to the protection of firearms, the Brady Law simply helps criminals, and it assures their continuing job safety. The much ballyhooed "public health approach to gun violence" merely spins "new clothes [a lab coat] for the emperor," offering an insidiously amoral, value-neutral perspective on gun deaths.

III

FIREARMS ARE NOT A "MEDICAL ISSUE"

The gun control advocacy literature from the "medical community"[5,6] shows that fully two-thirds of gun homicide

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[5] McGonigal MD, Cole J, Schwab W, Kauder DR, Rotondo MF, and Angood PB. Urban firearms deaths: a five-year perspective. J Trauma. 1993; 35(4): 532-36.

[6] Hutson HR, Anglin D, and Pratts MJ. Adolescents and children injured or killed in drive-by shootings in Los Angeles. New England Journal of Medicine, 1994; 330: 324-27.

"victims" are, in fact, drug dealers and their customers who wreak tremendous human and economic havoc upon society. In failing to account for this, the medical literature cannot and does not honestly assess these deaths.

Whether measured in human or economic terms, the peer-reviewed cost-benefit analysis finds an overwhelming net benefit of guns in our society. Significantly more lives and money are saved using firearms, than are lost using them.[7]

Without exception, all 14 studies of defensive firearm use suggest Americans use firearms defensively from 1 million to 2.5 million times annually.[8] The largest-scale, most comprehensive study of protective firearm use, Kleck & Gertz's National Self-Defense Survey, suggests about 2.5 million protective uses by adult Americans against human attackers each year. This means lives saved, injuries prevented, medical costs averted, and property protected.

About 400,000 of those who used firearms for self-defense believe they would have lost their lives had they not had a firearm for protection. Even if 90 percent of these firearm defenders were mistaken, the number of lives saved using firearms still outnumbers the lives taken using firearms by thousands. In some 98 percent of these defensive uses, the gun is not even fired. In only about 0.1 percent (one-in-a-thousand) of the protective uses is the attacker killed.[9]

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[7] Suter EA, et al. "Violence in America — Effective Solutions." J Med Assoc Ga June 1995; 84(6):253-263.

[8] Kleck G and Gertz M. "Armed Resistance to Crime: the Prevalence and Nature of Self-Defense with a Gun." Journal of Criminal Law & Criminology. Summer 1995:; 86:143-186.

[9] Suter EA, et al. "Violence in America — Effective Solutions." J Med Assoc Ga June 1995; 84(6):253-263.

The analysis set forth above exposes the fundamental flaw in research sponsored by the Centers for Disease Control (CDC) which purportedly shows "a gun owner is 43 times more likely to kill a family member than an intruder."[10] In fact, firearm defenders apprehend or repel attackers one thousand times as often as they kill them. The flawed and politicized nature of the CDC's much publicized research has been repeatedly exposed in the peer-reviewed and peer-acclaimed scientific literature [11,12] and before Congress. [13,14]

In a front page investigation on May 1, 1996, the Wall Street Journal[15] exposed the CDC's campaign of strategic factual misrepresentation regarding AIDS research. The

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[10] Kellermann AL. and Reay DT. "Protection or Peril? An Analysis of Firearms-Related Deaths in the Home." N Engl J. Med 1986. 314: 1557-60.

[11] Kates D, Schaffer HE, Lattimer JK, Murray GB, and Cassem EW. "Guns and Public Health: Epidemic of Violence or Pandemic of Propaganda?" Tennessee Law Review. Spring 1995; 62(3): 513-596.

[12] Suter EA. "Guns in the Medical Literature — A Failure of Peer Review." Journal of the Medical Association of Georgia. March 1994: 133-48.

[13] Suter EA, National Chair, Doctors for Integrity in Research & Public Policy. Testimony before the Subcommittee on the Constitution of the Judiciary Committee of the United States Senate. March 23, 1994

[14] Waters, WC 4th, Eastern Director, Doctors for Integrity in Policy Research, Inc.; Wheeler TW, President, Doctors for Responsible Gun Ownership; Faria M, Professor of Neurosurgery and Adjunct Professor of Medical History, Mercer University, former editor of the Journal of the Medical Association of Georgia; and Kates DB, civil rights attorney and criminologist. Testimony before the House of Representatives Committee on Appropriations, Subcommittee on Labor, Health and Human Services and Education. March 6, 1996.

[15] Bennett A and Sharpe A. "Health Hazard: AIDS Fight Is Skewed By Federal Campaign Exaggerating Risks." Wall Street Journal. May 1, 1996, pp 1 & 6.

CDC has waged a similar campaign of strategic lies regarding guns and violence.

Amici present this data to encourage this Court to view the flawed and politicized "science" that has polluted the public debate, media, and common wisdom regarding firearms in our society with a healthy skepticism. Such rigorous objectivity is essential in examining the key point of this brief: that not only does the Brady Law violate the Tenth Amendment, it is useless, and perhaps even dangerously counter-productive.

IV

PIERCING THE FALSE CLAIMS OF BRADY LAW BENEFITS

President Clinton asserted "Sixty thousand people with criminal records have not been able to buy handguns because of the passage of the Brady Bill,"[16] and the law "has made us a safer country."[17]

The President's remarks encapsulate all that is wrong with claims of the Brady Law's supposed benefits. Even the Government Accounting Office (GAO) survey,[18] the source of President Clinton's projected figure, stated its Brady Law sample data could not be projected to the nation at large (as

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[16] Clinton WJ, President of the United States of America. Remarks at the Democratic National Committee Gala. Washington Convention Center. Washington DC. May 8, 1966 10:32 p.m. EDT.

[17] Clinton WJ, President of the United States of America. Remarks to the people of DesMoines. Knapp Center, Drake University, Des Moines IA. February 11, 1996 2:05 p.m. CST.

[18] United States General Accounting Office. "Report to the Committee on the Judiciary — House of Representatives — Gun Control: Implementation of the Brady Handgun Violence Prevention Act." GAO/GGD-96-22 Washington DC: USGAO. January 1996. Hereinafter "GAO survey."

President Clinton did) to arrive at the "Sixty thousand" figure. The GAO survey shows that approximately half of the individuals prevented from purchasing firearms by Brady Law background checks, were not legally disqualified from firearm ownership.[19]

Significantly, the GAO did not conduct a national survey of law enforcement officials to arrive at its figures. Instead, it judgmentally selected and surveyed 20 law enforcement jurisdictions. The results of GAO's study, therefore, are not projectable to the universe of denials nationwide.[20] Unfortunately, Brady Law advocates ignore this important caveat from their own data source.

Additionally, such claims that "sixty thousand" illegal gun purchases were thwarted by the Brady Law are based upon denials in the entire nation, including the Brady-exempt states. However, Brady Law advocates cannot honestly claim the benefits obtained in states exempt from Brady Law provisions. The GAO survey found approximately half of Brady Law background check denials, the so-called "criminals," were erroneous. Half of these alleged "criminals" were flagged due to administrative errors (such as forms prepared or mailed incorrectly, innocents whose names are similar to felons, non-disqualifying misdemeanor traffic convictions, or other trivial "crimes" such as fishing without a license and failure to license dogs).

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[19] GAO survey Chapter 2.

[20] GAO survey at page 5.

Similarly, data from the National Institute of Justice[21] and from the Bureau of Alcohol, Tobacco and Firearms[22] suggest that, of those actual criminals caught by the Brady Law background checks, firearm purchase was not prevented; true criminals were merely displaced from the legal retail market into the illegal black market unaffected by the Brady Law.

Only some seven percent of criminals' handguns are obtained from retail sources, so controls on retail firearm sales cannot be expected to significantly reduce criminals' access to firearms. Despite exaggerated claims by the administration and gun prohibition lobbyists[23] regarding the success of the Brady Law, the Bureau of Alcohol, Tobacco and Firearms (BATF) has acknowledged what little evidence there is, is only anecdotal.[24]

Indeed, of the actual felons identified by Brady Law background checks during the first 1½ years since it was enacted, only seven had been successfully prosecuted (four received probation and three received prison sentences of between one to two years).

Since those denied the ability to purchase a firearm by the Brady Law are merely displaced into the "black market," the Brady Law's minimal benefit is really no benefit at all. Even President Clinton, himself a staunch defender of the

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[21] Wright JD and Rossi PH. Armed and Considered Dangerous: a Survey of Felons and their Firearms. Hawthorne, NY: Aldine de Gruyter. 1986.

[22] Bureau of Alcohol, Tobacco and Firearms. "Protecting America: The Effectiveness of the Federal Armed Career Criminal Statute." Washington DC: US DOJ BATF. Undated. Page 28.

[23] Aborn R, President of Handgun Control, Inc. Letter to the editor. Washington Post. September 30, 1994.

[24] Howlett D. Jury still out on success of the Brady Law. USA Today. December 28, 1994. p A-2.

Brady Law, had to admit the ultimate failure of that law: "It is true that you can still buy an illegal gun with cash in the streets."[25]

The real purveyors of violence, the vicious predators with lifelong histories of violence, are the criminals untouched by the Brady Law or other firearm laws. A meticulous scholarly analysis published in The Journal of Criminal Law & Criminology[26] reviewed these and other problems that expose the Brady Law not as a political boon, but as a public policy nightmare.

There is no persuasive evidence that the Brady Law has made society safer. Prior to implementation of the Brady Law in 1993, FBI Uniform Crime Report data showed that, in the 24 states and the District of Columbia where laws already existed to delay handgun purchases, violent crime was 34.6 percent higher, robbery was 76.9 percent higher, aggravated assault was 21.6 percent higher, and homicide was 3.7 percent higher.[27]

Following the implementation of the Brady Law, FBI Uniform Crime Report data from 1993 and 1994 show homicide dropped about twice as much in the 22 states exempt from the provisions of the Brady Law (a 7.3 percent drop from 1993 to 1994) in comparison with the 28 states subject to the provisions of the Brady Law (a 3.8 percent drop from 1993 to 1994).

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[25] Clinton WJ, President of the United States of America. Remarks on MTV's "Enough is Enough" forum on crime. Kalorama Studio. Washington DC. April 19, 1994 11:30 a.m. EDT.

[26] Jacobs JB and Potter KA. "Keeping Guns Out of the 'Wrong' Hands: The Brady Law and the Limits of Regulation." Journal of Criminal Law & Criminology. Summer 1995:; 86:93-120.

[27] Federal Bureau of Investigation, US Department of Justice. Uniform Crime Reports: Crime in the United States 1992. Washington DC: US Government Printing Office. 1993. Table 5.

Total violent crime dropped exactly twice as much in the 22 states exempt from the provisions of the Brady Law (a 4.8 percent drop from 1993 to 1994) in comparison with the 28 states subject to the provisions of the Brady Law (a 2.4 percent drop from 1993 to 1994).

Robbery dropped over three times as much in the 22 states exempt from the provisions of the Brady Law (an 8.8 percent drop from 1993 to 1994) in comparison with the 28 states subject to the provisions of the Brady Law (a 2.7 percent drop from 1993 to 1994).

Since most high-crime states and the District of Columbia were exempt from Brady Law provisions, the Brady Law would not have been expected to have had an effect on these jurisdictions. Instead, the Brady Law imposed background check and waiting period requirements upon traditionally low-crime states, *a priori* reason to have low expectations for Brady Law results.

At present, the District of Columbia and most high-crime cities are exempt from the Brady Law waiting period. Ten such high-crime cities (New York City, Chicago, Los Angeles, Detroit, District of Columbia, Baltimore, St. Louis, Phoenix, Atlanta, Richmond) accounted for 23 percent of 1994 US homicides.[28] "If it saves one life," but costs many lives, what then? The Brady Law is a failure, and predictably so.

In short, FBI Uniform Crime Report data from 1993 and 1994[29] actually show the 22 states exempt from Brady Law

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[28] Federal Bureau of Investigation, US Department of Justice. Uniform Crime Reports: Crime in the United States 1994. Washington DC: US Government Printing Office. 1995. Table 5.

[29] Federal Bureau of Investigation, US Department of Justice. Uniform Crime Reports: Crime in the United States 1993. Washington DC: US Government Printing Office. 1994. Table 5. Also, Federal Bureau of Investigation, US Department of Justice. Uniform Crime Reports:

provisions are safer than the 28 states subject to Brady Law provisions.

Contrary to the assertions of some advocates that dismantling the Brady Law will result in an epidemic of violence or a public policy disaster, the evidence suggests striking the Brady Law will be a benefit to the public safety.

V

CONCLUSION

Pick up any newspaper on any given day, and there will undoubtedly be a crime-related article which illustrates *amici's* contention that innocents suffer and die when they are denied timely access to firearms for self defense.

The Brady Law waiting period and the extraordinary number of Brady background check errors deny timely access to dozens of thousands of good, needful and law-abiding people. In so doing, *amici* contend the Brady Law costs many more lives than it saves because it denies or hampers citizens' inalienable right to defend themselves, their families, and their homes.

Amici strenuously object to the concept of citizens having to satisfy qualifications to exercise their constitutionally guaranteed right to keep and bear arms. However, if despite these most strenuous objections, there is to be an infringement of the right to self-defense and right to keep and bear arms, *amici* respectfully suggest this Court let it be the least intrusive infringement available; namely, an "instant check" system freely adopted by states, rather than imposed by the Brady Law's usurpation of Tenth Amendment state powers.

On a purely pragmatic level devoid of constitutional concerns (an unprincipled position we neither adopt nor

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Crime in the United States 1994. Washington DC: US Government Printing Office. 1995. Table 5.

recommend), there are no benefits whatsoever from the Brady Law except those that are better served by instant check systems.

Not only is the Brady Law offensive to the Tenth Amendment, it is a political fraud, a public policy failure, and it should be dismantled in its entirety.

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Respectfully submitted,

Steven A. Silver
The Lawyer's Second Amendment Society
18034 Ventura Blvd., No. 329
Encino, CA 91316
(310) 479-0515 ext. 239
Counsel for Amici Doctors for Integrity in Policy Research, Inc., Doctors for Responsible Gun Ownership, and The Lawyer's Second Amendment Society